



FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 16, 2006

MEMORANDUM

TO: The Commission

THROUGH: Robert J. Costa
Acting Staff Director

FROM: James A. Kahl
Deputy General Counsel

Rosemary C. Smith
Associate General Counsel

Brad C. Deutsch
Assistant General Counsel

Amy L. Rothstein
Attorney

Richard T. Ewell
Attorney

Subject: Draft AO 2006-14

Attached are three proposed alternative drafts of the subject advisory opinion. We request that these drafts be placed on the agenda for June 22, 2006.

Attachments

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, three alternatives for DRAFT ADVISORY OPINION 2006-14 are available for public comments under this procedure. The advisory opinion was requested by, Carol A. Laham, Esq. and D. Mark Renaud on behalf of National Restaurant Association PAC.

Proposed Advisory Opinion 2006-14 is scheduled to be on the Commission's agenda for its public meeting of Thursday, June 22, 2006.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (Eastern Time) on June 21, 2006.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2006-14, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

MAILING ADDRESSES

Commission Secretary
Federal Election Commission
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Rosemary C. Smith
Associate General Counsel
Office of General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

1 ADVISORY OPINION 2006-14

2
3 Carol A. Laham, Esquire
4 D. Mark Renaud, Esquire
5 Wiley Rein & Fielding, LLP
6 1776 K Street, NW
7 Washington, DC 20006

DRAFT A

8
9 Dear Ms. Laham and Mr. Renaud:

10 We are responding to your advisory opinion request on behalf of the National
11 Restaurant Association's political action committee ("NRA PAC"), regarding the
12 application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and
13 Commission regulations to a proposal by NRA PAC to communicate with the general
14 public to expressly advocate the election or defeat of, and solicit contributions to, certain
15 clearly identified candidates for Federal office. NRA PAC also proposes to solicit
16 contributions from the general public earmarked for Federal candidates, which NRA PAC
17 would then collect and forward to the designated candidates.

18 The Commission concludes that NRA PAC may expressly advocate and solicit
19 contributions to be sent directly to clearly identified candidates for Federal office in
20 communications with the general public. NRA PAC may not, however, solicit the
21 general public to send NRA PAC contributions earmarked for Federal candidates, for
22 NRA PAC to collect and forward to the designated candidates.

23 ***Background***

24 The facts presented in this advisory opinion are based on your letters received on
25 March 24 and April 6, 2006.

26 NRA PAC is the separate segregated fund ("SSF") of the National Restaurant
27 Association ("NRA"), an incorporated nonprofit trade association exempt from taxation

1 under Section 501(c)(6) of the Internal Revenue Code. NRA PAC proposes to fund
2 communications to the general public that expressly advocate the election or defeat of
3 certain clearly identified candidates for Federal office. In the same or separate
4 communications, NRA PAC also proposes to solicit contributions to certain clearly
5 identified candidates for Federal office. NRA PAC intends to distribute these
6 communications via e-mail and direct mail, on NRA's publicly available website, and in
7 paid advertisements on other publicly available websites.

8 NRA PAC also proposes to serve as a conduit or intermediary for the candidate
9 contributions that it solicits through the communications described above. Accordingly,
10 in its public solicitations, NRA PAC will ask contributors to send personal checks
11 payable to a designated candidate's authorized committee to NRA PAC for delivery by
12 NRA PAC to the candidate's authorized committee, or to provide credit card information
13 to NRA PAC, which NRA PAC would then transmit by secure means to the candidate
14 designated by the contributor.¹ NRA PAC plans to forward all earmarked contributions
15 to the selected candidate's authorized committee, along with contributor identification
16 and any necessary electronic information that the committee would need to process the
17 contribution, within ten days of receipt.

18 NRA PAC does not propose to solicit any contributions for itself in these
19 communications, nor does NRA PAC propose to deposit any funds that it receives as a
20 result of the communications into its own account or otherwise divert the funds for any
21 uses other than those clearly indicated in the contributor's earmarking instructions.

¹ NRA PAC will not itself process any credit card transactions.

1 Unless a contributor is a member of NRA's solicitable class,² NRA PAC plans to return
2 to the contributor any contribution that has not been earmarked by the contributor for a
3 particular candidate. With respect to contributions made by credit card via the Internet,
4 NRA PAC plans to use a website program that will permit only contributions that have
5 been earmarked to a selected candidate.

6 In its public solicitations, NRA PAC plans to inform prospective contributors that
7 contributions are limited to \$2,100 per election, that each contribution will be aggregated
8 for purposes of the \$2,100 per election contribution limit with any previous contribution
9 made by the contributor to the selected candidate, that contributions will be earmarked
10 pursuant to 2 U.S.C. 441a(a)(8) and 11 CFR 110.6, and that contributions by foreign
11 nationals are prohibited. In addition, each public solicitation will include a "best efforts"
12 statement pursuant to 11 CFR 104.7, and will request "all required information as
13 discussed in previous Commission opinions."

14 NRA PAC plans to make the proposed public solicitations without first
15 communicating with any candidate, authorized committee, or political party committee,
16 or an agent of any of the foregoing, other than to verify the addresses to which NRA PAC
17 should send earmarked contributions and to provide technical information to enable the
18 committee to decrypt contributors' encrypted credit card information. NRA PAC plans
19 to include in each public solicitation a disclaimer stating that the communication was

² NRA's "solicitable class" includes its own restricted class (*i.e.*, NRA's members and executive and administrative personnel, and their families), and NRA's other employees, who may be solicited up to two times each year. *See* 2 U.S.C. 441b(b)(4)(A)-(C); 11 CFR 114.1(j), 11 CFR 114.4, 11 CFR 114.5(g), 11 CFR 114.6, and 11 CFR 114.7. In addition, as the SSF of a trade association, NRA PAC may also solicit the stockholders and executive and administrative personnel of NRA's member corporations and their families, if certain conditions are met. *See* 2 U.S.C. 441b(b)(4)(D); 11 CFR 114.8.

1 paid for by NRA PAC and was not authorized by any candidate or candidate's
2 committee, and to provide NRA PAC's Web address, phone number, or street address.

3 NRA PAC plans to report as independent expenditures the costs directly
4 connected to its proposed communications. NRA PAC plans to treat as operating
5 expenses the costs of processing and transmitting the earmarked contributions and
6 contributor information.

7 ***Questions Presented***

8 *1. May NRA PAC pay for, and treat as independent expenditures,*
9 *communications to the general public that expressly advocate the election or defeat of a*
10 *clearly identified Federal candidate and/or solicit contributions for a clearly identified*
11 *Federal candidate?*

12 *2. May NRA PAC pay, and treat as operating expenses, the cost of transmitting to*
13 *the designated recipient candidate any contributions raised through NRA PAC's*
14 *solicitation communications to the general public (including the cost of transmitting*
15 *required contributor information)?*

16 *3. May NRA PAC continue to make independent expenditures with respect to a*
17 *candidate after it (a) obtains any e-mail or street address from the candidate's*
18 *authorized committee for purposes of transmitting earmarked contributions and/or (b)*
19 *sends the candidate's authorized committee technical information about the decryption*
20 *process necessary for future earmarked contributions?*

21 ***Legal Analysis and Conclusions***

22 *1. May NRA PAC pay for, and treat as independent expenditures,*
23 *communications to the general public that expressly advocate the election or defeat of a*

1 *clearly identified Federal candidate and/or solicit contributions for a clearly identified*
2 *Federal candidate?*

3 Yes, NRA PAC may pay for communications to the general public that expressly
4 advocate the election or defeat of clearly identified Federal candidates and/or solicit
5 contributions to Federal candidates, so long as NRA PAC pays for the communications
6 with voluntary contributions that it has received pursuant to the Act and Commission
7 regulations and does not solicit contributions to any SSF, including itself. NRA PAC
8 may treat the costs of its express advocacy and solicitation communications to the general
9 public as independent expenditures, so long as the communications are not coordinated
10 with any candidates, their authorized committees or agents.

11 The Act prohibits corporations, including incorporated trade associations such as
12 NRA, from making any contributions or expenditures in connection with a Federal
13 election.³ See 2 U.S.C. 441b. With some exceptions, this prohibition extends to
14 communications that expressly advocate the election or defeat of a clearly identified
15 Federal candidate made by a corporation to anyone outside of the corporation's
16 solicitable class.

17 The Act does not, however, impose the same restrictions on communications
18 made by a corporation's SSF, such as NRA PAC. Instead, the Act allows an SSF to use
19 voluntary contributions that have been properly made to the SSF to fund communications
20 with the general public on any subject, including communications that expressly advocate
21 the election or defeat of clearly identified Federal candidates, so long as the
22 communications do not solicit contributions to any SSF, including itself. See 2 U.S.C.

³ Contributions include direct or indirect payments, or gifts of money, or any services, or anything of value, to any candidate for Federal office. See 2 U.S.C. 441b(b)(2); 11 CFR 114.1(a)(1).

1 441b(b)(4)(A)(i); 11 CFR 114.5(i); *see also* Advisory Opinions 1997-16 (ONRC Action)
2 and 1988-38, n.3 (Chicago Bd. of Trade).

3 In Advisory Opinion 1997-16, the Commission advised Oregon Natural
4 Resources Council Action (“ONRC Action”), an incorporated membership organization,
5 that ONRC Action could not use its funds, facilities and personnel to communicate its
6 endorsements of Federal candidates on ONRC Action’s website, without any limitation
7 on access by the general public. The Commission noted, however, that “the [SSF] of
8 ONRC Action[] can make contributions and expenditures with regard to Federal
9 elections, subject to the Act’s limits and disclosure requirements. The cost of making
10 public the [corporation’s] candidate endorsements, if paid for by the [SSF], and
11 depending on whether the distribution activity was coordinated with the various
12 candidates endorsed, would be considered either an independent expenditure on behalf of
13 the candidates endorsed or an in-kind contribution to them.”⁴

14 Commission regulations do not distinguish between communications by an SSF
15 that expressly advocate the election or defeat of a clearly identified Federal candidate, on
16 the one hand, and communications that solicit contributions to a clearly identified Federal
17 candidate, on the other hand, so long as the SSF pays for the communications with
18 voluntary contributions and does not solicit contributions to any SSF in the
19 communications. *See* 11 CFR 114.5(i).

20 Accordingly, NRA PAC may expressly advocate the election or defeat of, and
21 solicit contributions for, clearly identified candidates via e-mail and direct mail, on

⁴ The Commission also indicated that ONRC Action’s SSF could use ONRC Action’s voice mail system to inform members of the general public who telephoned ONRC Action about the corporation’s candidate endorsements, so long as the SSF assumed all costs associated with its use of the voice mail system.

1 NRA's publicly available website, and in advertisements on other publicly available
2 websites, provided that NRA PAC pays for the communications with voluntary
3 contributions and does not solicit contributions to any SSF, including itself.

4 The costs NRA PAC incurs in making communications to the general public that
5 expressly advocate the election or defeat of clearly identified Federal candidates and/or
6 solicit contributions to Federal candidates must be treated as either independent
7 expenditures on behalf of the candidates for whom NRA PAC expressly advocates or
8 solicits, or as in-kind contributions to the candidates, depending on whether the
9 communications are "coordinated communications" under 11 CFR 109.21.

10 To be a "coordinated communication" under 11 CFR 109.21, a communication
11 must satisfy each prong of a three-pronged test.⁵ First, the communications must meet
12 the "payment prong," in that someone other than a candidate, an authorized committee, a
13 political party committee, or an agent of any of the foregoing must pay for the
14 communication. *See* 11 CFR 109.21(a)(1). Second, the subject matter of the
15 communication must meet a "content standard." *See* 11 CFR 109.21(a)(2); 11 CFR
16 109.21(c). Third, the interaction between the person paying for the communication and
17 the candidate, the candidate's committee, a political party committee, or their agents must
18 meet a "conduct standard." *See* 11 CFR 109.21(a)(3); 11 CFR 109.21(d).

19 NRA PAC's communications with the general public would meet the payment
20 prong of the coordinated communication test because they would be paid by NRA PAC
21 and not by a candidate, an authorized committee, a political party committee, or their

⁵ The Commission recently made certain revisions to 11 CFR 109.21, effective July 10, 2006. *See* Coordinated Communications Final Rules, 71 *Fed. Reg.* 33190 (June 8, 2006). However, none of the changes in the revised rules affects the advice provided in this advisory opinion.

1 agents. 11 CFR 109.21(a)(1). All of NRA PAC's proposed communications, with the
2 exception of those sent through e-mail, would also meet the content standard because
3 they would contain express advocacy.⁶ 11 CFR 109.21(c)(3). Nonetheless, the
4 Commission concludes that none of the communications would be a "coordinated
5 communication," because they would each fail to meet any of the conduct standards
6 contained in the third prong of the test.⁷

7 The only proposed interactions between NRA PAC and a candidate or a
8 candidate's authorized committee involve NRA PAC contacting the intended recipient-
9 candidate to verify the addresses to which earmarked contributions should be sent and to
10 provide certain technical information necessary for decryption of protected credit card
11 information. The limited interaction between NRA PAC and a candidate or a candidate's
12 authorized committee necessary to verify addresses, without more, would not alone
13 satisfy any of the conduct standards contained in the coordinated communication rule. 11
14 CFR 109.21(d) and note 7, above. Thus, should NRA PAC wish to solicit the general
15 public to send contributions directly to a Federal candidate, any communications between
16 it and the candidate's authorized committee that are limited to verifying the addresses to
17 which contributions should be sent would not be "coordinated communications."

18 2. *May NRA PAC pay, and treat as operating expenses, the cost of transmitting to*
19 *the designated recipient candidate any contributions raised through NRA PAC's*

⁶ E-mail communications cannot be coordinated communications under 11 CFR 109.21(c)(3) because they do not qualify as "public communications." See 11 CFR 100.26 (2006).

⁷ These conduct standards include, in relevant part: (1) "requests or suggestions" for communications by candidates; (2) "material involvement" in the making of communications; (3) "substantial discussions" regarding candidate plans, projects, activities, or needs; (4) involvement of "common vendors;" and (5) involvement of individuals who were formerly employees or independent contractors of a candidate. 11 CFR 109.21(d)(1)-(5). The Commission has focused on the first three conduct standards because you stated in your request for an advisory opinion that NRA PAC does not propose to use any common vendors, former employees or independent contractors in its proposed activities.

1 *solicitation communications to the general public (including the cost of transmitting*
2 *required contributor information)?*

3 No, NRA PAC may not pay the cost of transmitting such contributions to
4 candidates, given that NRA PAC may not solicit the general public to send NRA PAC
5 contributions earmarked for Federal candidates. This conclusion is based on three
6 reasons, explained below. First, a solicitation by NRA PAC of contributions from the
7 general public that are earmarked to NRA PAC's preferred candidates, for NRA PAC
8 then to collect and forward to the candidates, would be contrary to the Act because it
9 would be equivalent to NRA PAC soliciting contributions from the public to NRA PAC
10 itself. *See* 2 U.S.C. 441b(b)(4)(A)(i). Second, a corporate SSF that serves as a conduit
11 for political contributions from individuals who have no connection whatsoever to the
12 SSF's connected corporation would disrupt the careful balance struck by Congress in the
13 Act. Third, the collection and transmittal by NRA PAC of contributions from the general
14 public to candidates would go well beyond the forms of "communicat[ion]" with the
15 general public that SSFs are permitted to engage in pursuant to Commission regulations
16 implementing the Act.⁸ 11 CFR 114.5(i).

17 Although the Act prohibits corporations from making contributions or
18 expenditures in connection with a Federal election, 2 U.S.C. 441b, the Act allows
19 corporations to participate in the Federal electoral process through their SSFs.⁹ To this
20 end, a corporation may pay all of the costs associated with establishing, administering,
21 and soliciting contributions to its SSF and may control all aspects of its SSF's operations.

⁸ You have asked, in the alternative, whether NRA itself may pay the transmittal and compliance costs of NRA PAC's transmittal of earmarked contributions from the general public. The Commission has determined that NRA may not pay these costs for the same reasons that NRA PAC may not pay them.

⁹ *See FEC v. National Right to Work Comm.*, 459 U.S. 197, 201 (1982).

1 See 11 CFR 114.5(b). The Supreme Court has acknowledged that “[an SSF] may be
2 completely controlled by the sponsoring corporation [. . .], whose officers may decide
3 which political candidates contributions to the fund will be spent to assist. The fund must
4 be separate from the sponsoring [. . .] corporation only in the sense that there must be a
5 strict segregation of its monies from the corporation’s other assets.”¹⁰ Indeed,
6 Commission regulations assume that a corporation has control of its SSF. See 11 CFR
7 114.5(d); Advisory Opinion 1996-01 (Ass’n of Trial Lawyers of America). This identity
8 of interest between a corporation and its SSF is reflected in the requirement that an SSF
9 include in its name the full name of the fund’s sponsoring organization. See 2 U.S.C.
10 432(e)(5); 11 CFR 102.14(c).

11 Together with the benefits that a corporate SSF enjoys as a result of its close
12 association with its sponsoring corporation, corporate SSFs are subject to some of the
13 same restrictions as their sponsoring corporations. Specifically, the Act generally
14 prohibits *both* a corporation *and* the corporation’s SSF from soliciting contributions to
15 the SSF from persons outside of the corporation’s restricted class. See 2 U.S.C.
16 441b(b)(4)(A)(i). This provision ensures that a corporation, and the SSF through which
17 the corporation operates, will solicit contributions for Federal political purposes only
18 from individuals who are directly connected to the corporation and thus have a stake in
19 the corporation’s success in the political arena. See, e.g., *National Right to Work Comm.*,
20 459 U.S. at 204. Allowing an SSF to solicit earmarked contributions from the general
21 public for the SSF to collect and deliver to candidates pre-selected by the SSF would
22 thwart congressional intent as embodied in 2 U.S.C. 441b(b)(4)(A)(i), because the

¹⁰ *Id.* at 200 n.4 (internal quotation marks, brackets, and citations omitted).

1 contributions that the SSF would collect from the general public, although earmarked to
2 Federal candidates, would, in effect, serve as proxies for contributions to the SSF itself.
3 A successful solicitation to the general public on behalf of a candidate would relieve the
4 SSF of the need to expend its own limited funds as contributions to the candidate and
5 would enable the SSF to redirect those funds to other purposes, such as, for instance,
6 financing additional solicitations to the general public. Permitting an SSF to do indirectly
7 what the Act prohibits the SSF from doing directly invites circumvention of the Act and,
8 as such, is not allowed.

9 More significantly, your proposal would enable NRA PAC to serve a function
10 that was never contemplated by the Act and Commission regulations. As the political
11 alter egos of their connected corporations, corporate SSFs may solicit voluntary
12 contributions from individuals with a direct and vital interest in the corporation's well-
13 being – that is, the corporation's shareholders, executive and administrative personnel,
14 their families and, through twice-yearly solicitations, the corporation's other employees¹¹
15 – in order to give the corporation a limited voice in Federal elections. A corporate SSF
16 that serves as a conduit for political contributions from individuals who have no
17 connection whatsoever to the SSF's connected corporation would disrupt the careful
18 balance struck by Congress in the Act. Such an SSF would be able to deliver
19 contributions to favored candidates in amounts far greater than the SSF otherwise would
20 be permitted to make, thus significantly enhancing the influence of the SSF's connected
21 corporation in Federal elections. As the Supreme Court has noted in upholding other
22 restrictions in the Act on large campaign contributions, "It is not only plausible, but

¹¹ See 11 CFR 114.6.

1 likely, that candidates would feel grateful for such donations and that donors would seek
2 to exploit that gratitude.” *McConnell v. FEC*, 540 U.S. 93, 145 (2003).

3 Moreover, an SSF that collects and transmits earmarked contributions from the
4 general public would exceed its authority under Commission regulations to
5 “communicate with the general public.” 11 CFR 114.5(i). Although the Commission has
6 not previously addressed the scope of an SSF’s authority to communicate with the
7 general public under 11 CFR 114.5(i), the Commission has commented on the scope of a
8 corporation’s right to communicate with its restricted class under 2 U.S.C. 441b(b)(2)(A).
9 In Advisory Opinion 1987-29 (Nat’l Ass’n of Life Underwriters), for example, the
10 Commission concluded that a corporation’s right to communicate with its restricted class
11 included the right to solicit its restricted class to send contributions directly to Federal
12 candidates, where the solicitations would be limited to providing information and the
13 corporation would not assist the actual making of any contributions. Under your
14 proposal, by contrast, NRA PAC would not only provide information to the general
15 public in the form of solicitations, but it would also collect and forward contributions to
16 candidates. This collection and forwarding activity on the part of NRA PAC would go
17 beyond merely communicating with the general public. As such, it would exceed NRA
18 PAC’s authority under 11 CFR 114.5(i).

19 The facts of this advisory opinion differ materially from those in Advisory
20 Opinion 2003-23 (WE LEAD), in which the Commission approved a proposal by WE
21 LEAD, a nonconnected committee, to solicit earmarked contributions from the general
22 public that it would then collect and forward to a Federal candidate. Unlike NRA PAC,
23 WE LEAD did not have a sponsoring corporation to control and subsidize its operations.

1 The Act permits nonconnected committees, such as WE LEAD, to solicit contributions to
2 themselves from the general public, unlike connected SSFs, such as NRA PAC, which,
3 with certain statutory exceptions not applicable here, are limited to soliciting their
4 connected organizations' restricted class. *See* 2 U.S.C. 441b(b)(4). In fact, nonconnected
5 political committees depend entirely on public solicitations to fund their operations.

6 Because nonconnected committees can solicit contributions to themselves from the
7 general public, they stand in the same relationship to the general public as an SSF stands
8 in relationship to its restricted class. Thus, nonconnected committees may solicit, collect
9 and forward contributions earmarked to a clearly identified Federal candidate from the
10 general public, just as an SSF may solicit, collect and forward contributions earmarked to
11 Federal candidates from its restricted class.¹² The fact that political committees are
12 treated differently from SSFs reflects Congress's and the Supreme Court's judgment that
13 "the differing structures and purposes of different entities may require different forms of
14 regulation in order to protect the integrity of the electoral process."¹³

15 *3. May NRA PAC continue to make independent expenditures with respect to a*
16 *candidate after it (a) obtains any e-mail or street address from the candidate's*
17 *authorized committee for purposes of transmitting earmarked contributions and/or (b)*
18 *sends the candidate's authorized committee technical information about the decryption*
19 *process necessary for future earmarked contributions?*

20 The Commission does not reach this question because the Commission has
21 determined that NRA PAC may not solicit the general public to send earmarked

¹² *See* 11 CFR 114.2(f)(3); *see also* Explanation and Justification for 11 CFR 114.2(f)(3), Final Rule and Transmittal of Regulations to Congress, Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates, 60 Fed. Reg. 64260, 64265 (Dec. 14, 1995).

¹³ *FEC v. National Right to Work Comm.*, 459 U.S. at 210 (internal quotation marks and citations omitted).

1 contributions to NRA PAC, and then for NRA PAC to collect and forward the
2 contributions to Federal candidates.

3 This response constitutes an advisory opinion concerning the application of the
4 Act and Commission regulations to the specific transaction or activity set forth in your
5 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
6 of the facts or assumptions presented, and such facts or assumptions are material to a
7 conclusion presented in this advisory opinion, then the requestor may not rely on that
8 conclusion as support for its proposed activity.

9

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Sincerely,

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Michael E. Toner

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Chairman

16

17 Enclosures (Advisory Opinions 2003-23, 1997-16, 1996-01, 1988-38, and 1987-29)

1 ADVISORY OPINION 2006-14

2
3 Carol A. Laham, Esquire
4 D. Mark Renaud, Esquire
5 Wiley Rein & Fielding, LLP
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7 Washington, DC 20006

DRAFT B

8
9 Dear Ms. Laham and Mr. Renaud:

10 We are responding to your advisory opinion request on behalf of the National
11 Restaurant Association's political action committee ("NRA PAC"), regarding the
12 application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and
13 Commission regulations to a proposal by NRA PAC to communicate with the general
14 public to expressly advocate the election or defeat of, and solicit contributions to, certain
15 clearly identified candidates for Federal office. NRA PAC also proposes to solicit
16 contributions from the general public earmarked for Federal candidates, which NRA PAC
17 would then collect and forward to the designated candidates.

18 The Commission concludes that NRA PAC may expressly advocate and solicit
19 contributions to be sent directly to clearly identified candidates for Federal office in
20 communications with the general public. In addition, NRA PAC may solicit the general
21 public to send contributions earmarked for candidates to NRA PAC, but must treat the
22 cost of soliciting, collecting and transmitting those earmarked funds as contributions by
23 NRA PAC to the designated candidates.

24 ***Background***

25 The facts presented in this advisory opinion are based on your letters received on
26 March 24 and April 6, 2006.

1 NRA PAC is the separate segregated fund (“SSF”) of the National Restaurant
2 Association (“NRA”), an incorporated nonprofit trade association exempt from taxation
3 under Section 501(c)(6) of the Internal Revenue Code. NRA PAC proposes to fund
4 communications to the general public that expressly advocate the election or defeat of
5 certain clearly identified candidates for Federal office. In the same or separate
6 communications, NRA PAC also proposes to solicit contributions to certain clearly
7 identified candidates for Federal office. NRA PAC intends to distribute these
8 communications via e-mail and direct mail, on NRA’s publicly available website, and in
9 paid advertisements on other publicly available websites.

10 NRA PAC also proposes to serve as a conduit or intermediary for the candidate
11 contributions that it solicits through the communications described above. Accordingly,
12 in its public solicitations, NRA PAC will ask contributors to send personal checks
13 payable to a designated candidate’s authorized committee to NRA PAC for delivery by
14 NRA PAC to the candidate’s authorized committee, or to provide credit card information
15 to NRA PAC, which NRA PAC would then transmit by secure means to the candidate
16 designated by the contributor.¹ NRA PAC plans to forward all earmarked contributions
17 to the selected candidate’s authorized committee, along with contributor identification
18 and any necessary electronic information that the committee would need to process the
19 contribution, within ten days of receipt.

20 NRA PAC does not propose to solicit any contributions for itself in these
21 communications, nor does NRA PAC propose to deposit any funds that it receives as a
22 result of the communications into its own account or otherwise divert the funds for any

¹ NRA PAC will not itself process any credit card transactions.

1 uses other than those clearly indicated in the contributor's earmarking instructions.

2 Unless a contributor is a member of NRA's solicitable class,² NRA PAC plans to return
3 to the contributor any contribution that has not been earmarked by the contributor for a
4 particular candidate. With respect to contributions made by credit card via the Internet,
5 NRA PAC plans to use a website program that will permit only contributions that have
6 been earmarked to a selected candidate.

7 In its public solicitations, NRA PAC plans to inform prospective contributors that
8 contributions are limited to \$2,100 per election, that each contribution will be aggregated
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11 pursuant to 2 U.S.C. 441a(a)(8) and 11 CFR 110.6, and that contributions by foreign
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13 statement pursuant to 11 CFR 104.7, and will request "all required information as
14 discussed in previous Commission opinions."

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16 communicating with any candidate, authorized committee, or political party committee,
17 or an agent of any of the foregoing, other than to verify the addresses to which NRA PAC
18 should send earmarked contributions and to provide technical information to enable the
19 committee to decrypt contributors' encrypted credit card information. NRA PAC plans
20 to include in each public solicitation a disclaimer stating that the communication was

² NRA's "solicitable class" includes its own restricted class (*i.e.*, NRA's members and executive and administrative personnel, and their families), and NRA's other employees, who may be solicited up to two times each year. *See* 2 U.S.C. 441b(b)(4)(A)-(C); 11 CFR 114.5(g), 11 CFR 114.6, and 11 CFR 114.7. In addition, as the SSF of a trade association, NRA PAC may also solicit the stockholders and executive and administrative personnel of NRA's member corporations and their families, if certain conditions are met. *See* 2 U.S.C. 441b(b)(4)(D); 11 CFR 114.1(j), 11 CFR 114.4, and 11 CFR 114.8.

1 paid for by NRA PAC and was not authorized by any candidate or candidate's
2 committee, and to provide NRA PAC's Web address, phone number, or street address.

3 NRA PAC plans to report as independent expenditures the costs directly
4 connected to its proposed communications. NRA PAC plans to treat as operating
5 expenses the costs of processing and transmitting the earmarked contributions and
6 contributor information.

7 ***Questions Presented***

8 *1. May NRA PAC pay for, and treat as independent expenditures,*
9 *communications to the general public that expressly advocate the election or defeat of a*
10 *clearly identified Federal candidate and/or solicit contributions for a clearly identified*
11 *Federal candidate?*

12 *2. May NRA PAC pay, and treat as operating expenses, the cost of transmitting to*
13 *the designated recipient candidate any contributions raised through NRA PAC's*
14 *solicitation communications to the general public (including the cost of transmitting*
15 *required contributor information)?*

16 *3. May NRA PAC continue to make independent expenditures with respect to a*
17 *candidate after it (a) obtains any e-mail or street address from the candidate's*
18 *authorized committee for purposes of transmitting earmarked contributions and/or (b)*
19 *sends the candidate's authorized committee technical information about the decryption*
20 *process necessary for future earmarked contributions?*

21 ***Legal Analysis and Conclusions***

22 *1. May NRA PAC pay for, and treat as independent expenditures,*
23 *communications to the general public that expressly advocate the election or defeat of a*

1 *clearly identified Federal candidate and/or solicit contributions for a clearly identified*
2 *Federal candidate?*

3 Yes, NRA PAC may pay for communications to the general public that expressly
4 advocate the election or defeat of clearly identified Federal candidates and/or solicit
5 contributions to Federal candidates, so long as NRA PAC pays for the communications
6 with voluntary contributions that it has received pursuant to the Act and Commission
7 regulations and does not solicit contributions to any SSF, including itself. NRA PAC
8 may treat the costs of its express advocacy and solicitation communications to the general
9 public as independent expenditures, so long as the communications are not coordinated
10 with any candidates, their authorized committees or agents.

11 The Act prohibits corporations, including incorporated trade associations such as
12 NRA, from making any contributions or expenditures in connection with a Federal
13 election.³ See 2 U.S.C. 441b. With some exceptions, this prohibition extends to
14 communications that expressly advocate the election or defeat of a clearly identified
15 Federal candidate made by a corporation to anyone outside of the corporation's
16 solicitable class.

17 The Act does not, however, impose the same restrictions on communications
18 made by a corporation's SSF, such as NRA PAC. Instead, the Act allows an SSF to use
19 voluntary contributions that have been properly made to the SSF to fund communications
20 with the general public on any subject, including communications that expressly advocate
21 the election or defeat of clearly identified Federal candidates, so long as the
22 communications do not solicit contributions to any SSF, including itself. See 2 U.S.C.

³ Contributions include direct or indirect payments or gifts of money or any services, or anything of value, to any candidate for Federal office. See 2 U.S.C. 441b(b)(2); 11 CFR 114.1(a)(1).

1 441b(b)(4)(A)(i); 11 CFR 114.5(i); *see also* Advisory Opinions 1997-16 (ONRC Action)
2 and 1988-38, n.3 (Chicago Bd. Of Trade).

3 In Advisory Opinion 1997-16, the Commission advised Oregon Natural
4 Resources Council Action (“ONRC Action”), an incorporated membership organization,
5 that ONRC Action could not use its funds, facilities and personnel to communicate its
6 endorsements of Federal candidates on ONRC Action’s website, without any limitation
7 on access by the general public. The Commission noted, however, that “the [SSF] of
8 ONRC Action[] can make contributions and expenditures with regard to Federal
9 elections, subject to the Act’s limits and disclosure requirements. The cost of making
10 public the [corporation’s] candidate endorsements, if paid for by the [SSF], and
11 depending on whether the distribution activity was coordinated with the various
12 candidates endorsed, would be considered either an independent expenditure on behalf of
13 the candidates endorsed or an in-kind contribution to them.”⁴

14 Commission regulations do not distinguish between communications by an SSF
15 that expressly advocate the election or defeat of a clearly identified Federal candidate, on
16 the one hand, and communications that solicit contributions to a clearly identified Federal
17 candidate, on the other hand, so long as the SSF pays for the communications with
18 voluntary contributions and does not solicit contributions to any SSF in the
19 communications. *See* 11 CFR 114.5(i).

20 Accordingly, NRA PAC may expressly advocate the election or defeat of, and
21 solicit contributions for, clearly identified candidates via e-mail and direct mail, on

⁴ The Commission also indicated that ONRC Action’s SSF could use ONRC Action’s voice mail system to inform members of the general public who telephoned ONRC Action about the corporation’s candidate endorsements, so long as the SSF assumed all costs associated with its use of the voice mail system.

1 NRA's publicly available website, and in advertisements on other publicly available
2 websites, provided that NRA PAC pays for the communications with voluntary
3 contributions and does not solicit contributions to any SSF, including itself.

4 The costs NRA PAC incurs in making communications to the general public that
5 expressly advocate the election or defeat of clearly identified Federal candidates and/or
6 solicit contributions to Federal candidates must be treated as either independent
7 expenditures on behalf of the candidates for whom NRA PAC expressly advocates or
8 solicits, or as in-kind contributions to the candidates, depending on whether the
9 communications are "coordinated communications" under 11 CFR 109.21.

10 To be a "coordinated communication" under 11 CFR 109.21, a communication
11 must satisfy each prong of a three-pronged test.⁵ First, the communications must meet
12 the "payment prong," in that someone other than a candidate, an authorized committee, a
13 political party committee, or an agent of any of the foregoing must pay for the
14 communication. *See* 11 CFR 109.21(a)(1). Second, the subject matter of the
15 communication must meet a "content standard." *See* 11 CFR 109.21(a)(2); 11 CFR
16 109.21(c). Third, the interaction between the person paying for the communication and
17 the candidate, the candidate's committee, a political party committee, or their agents must
18 meet a "conduct standard." *See* 11 CFR 109.21(a)(3); 11 CFR 109.21(d).

19 NRA PAC's communications with the general public would meet the payment
20 prong of the coordinated communication test because they would be paid by NRA PAC
21 and not by a candidate, an authorized committee, a political party committee, or their

⁵ The Commission recently made certain revisions to 11 CFR 109.21, effective July 10, 2006. *See* Coordinated Communications Final Rules, 71 *Fed. Reg.* 33190 (June 8, 2006). However, none of the changes in the revised rules affects the advice provided in this advisory opinion.

1 agents. 11 CFR 109.21(a)(1). All of NRA PAC's proposed communications, with the
2 exception of those sent through e-mail, would also meet the content standard because
3 they would contain express advocacy.⁶ 11 CFR 109.21(c)(3). Nonetheless, the
4 Commission concludes that none of the communications would be a "coordinated
5 communication," because they would each fail to meet any of the conduct standards
6 contained in the third prong of the test.⁷

7 The only proposed interactions between NRA PAC and a candidate or a
8 candidate's authorized committee involve NRA PAC contacting the intended recipient-
9 candidate to verify the addresses to which earmarked contributions should be sent and to
10 provide certain technical information necessary for decryption of protected credit card
11 information. The limited interactions between NRA PAC and a candidate or a
12 candidate's authorized committee necessary to verify addresses and to provide technical
13 information, without more, would not alone satisfy any of the conduct standards
14 contained in the coordinated communication rule. 11 CFR 109.21(d) and note 7, above.
15 Thus, should NRA PAC wish to solicit the general public to send contributions directly to
16 a Federal candidate, any communications between it and the candidate's authorized
17 committee that are limited to verifying the addresses to which contributions should be
18 sent would not be "coordinated communications" and any costs associated with this
19 activity can be treated as independent expenditures. However, should NRA PAC wish to

⁶ E-mail communications cannot be coordinated communications under 11 CFR 109.21(c)(3) because they do not qualify as "public communications." *See* 11 CFR 100.26 (2006).

⁷ These conduct standards include, in relevant part: (1) "requests or suggestions" for communications by candidates; (2) "material involvement" in the making of communications; (3) "substantial discussions" regarding candidate plans, projects, activities, or needs; (4) involvement of "common vendors;" and (5) involvement of individuals who were formerly employees or independent contractors of a candidate. 11 CFR 109.21(d)(1)-(5). The Commission has focused on the first three conduct standards because you stated in your request for an advisory opinion that NRA PAC does not propose to use any common vendors, former employees or independent contractors in its proposed activities.

1 solicit the general public to send earmarked contributions to NRA PAC, which NRA
2 PAC would then collect and forward to the designated candidates, NRA PAC must, as
3 explained below, treat the costs of soliciting, collecting and transmitting such earmarked
4 funds as contributions from NRA PAC to the candidates.

5 2. *May NRA PAC pay, and treat as operating expenses, the cost of transmitting to*
6 *the designated recipient candidate any contributions raised through NRA PAC's*
7 *solicitation communications to the general public (including the cost of transmitting*
8 *required contributor information)?*

9 NRA PAC may pay to solicit the general public to send earmarked contributions
10 to NRA PAC, and may pay the costs of collecting and forwarding those earmarked
11 contributions to the designated candidates. However, NRA PAC must treat the costs of
12 soliciting, collecting and transmitting the earmarked funds as contributions from NRA
13 PAC to the designated candidates.

14 Although a corporation and its SSF are expressly prohibited from soliciting
15 contributions *to any SSF*, including itself, from persons outside of the corporation's
16 solicitable class, *see* 2 U.S.C. 441b(b)(4)(A)(i), neither the Act nor Commission
17 regulations prohibit an SSF from soliciting contributions *to a Federal candidate* from
18 persons beyond its solicitable class. As discussed in the answer to your first question, an
19 SSF may solicit the general public to send contributions directly to candidates. The
20 Commission's regulations also specifically contemplate an SSF "[s]oliciting
21 contributions to a candidate" and "collecting and forwarding contributions earmarked to a
22 candidate." *See* 11 CFR 114.2(f)(3); *see also* Explanation and Justification for 11 CFR
23 114.2(f)(3), Final Rule and Transmittal of Regulations to Congress, Corporate and Labor

1 Organization Activity; Express Advocacy and Coordination with Candidates, 60 FR
2 64260, 64265 (Dec. 14, 1995) (SSFs “may continue to solicit, collect and forward
3 earmarked contributions to candidates . . .”).

4 Because an SSF may solicit, collect, and forward earmarked contributions, and
5 because nothing in 11 CFR 114.2(f) specifically limits an SSF to conducting these
6 activities only with respect to its solicitable class, the Commission concludes that an SSF
7 may solicit the general public for earmarked contributions and also may then collect and
8 forward the earmarked contributions to the designated candidates.⁸ Thus, based on the
9 facts you present in your request, NRA PAC may solicit contributions to Federal
10 candidates from persons beyond its solicitable class, to be collected and forwarded by
11 NRA PAC, and NRA PAC may pay the costs of collecting and forwarding those
12 earmarked contributions.

13 Although NRA PAC may pay the costs of the proposed public solicitations, as
14 well as the costs associated with collecting and forwarding earmarked contributions that
15 result from the solicitations, these costs must be paid from voluntary contributions to
16 NRA PAC (*i.e.*, not from corporate treasury funds), and these costs will count as in-kind
17 contributions from NRA PAC to the designated candidates. When the Commission
18 promulgated 11 CFR 114.2(f)(2) and (3), the Commission noted that while an SSF “may
19 continue to solicit, collect and forward earmarked contributions . . .,” the money
20 expended by the SSF on these activities “must come from permissible funds received
21 under the FECA, and will count against the [SSF’s] contribution limit for the candidate(s)

⁸ The regulations at 11 CFR 114.5(i) permit SSF communications to the general public with one narrow exception (*i.e.*, soliciting contributions to an SSF). 11 CFR 114.5(i) (SSFs “may, using voluntary contributions, communicate with the general public, except that such communications may not solicit contributions to a separate segregated fund . . .”).

involved.” *See* Explanation and Justification for 114.2(f), 60 FR 64260, 64265.⁹

Although NRA PAC may treat the costs of its proposed public solicitations as independent expenditures when the solicitations are for contributions to be sent directly to Federal candidates, when the public solicitations are combined with NRA PAC’s collection and forwarding of earmarked contributions, all costs for these activities must be treated as contributions from NRA PAC to the respective recipient candidate and are allocable under 11 CFR 106.1.

The costs of transmitting earmarked contributions, therefore, may not be treated as “operating expenses.” Moreover, the costs are not directly related to the day-to-day administration or operation of the PAC but are, instead, incurred solely for the purpose of directing contributions to clearly identified candidates. As a result, NRA PAC’s costs to collect and forward the earmarked contributions to the designated candidates, in addition to the costs of soliciting contributions to be directed to the candidates through the SSF, are contributions from NRA PAC to the recipient candidates.¹⁰

The facts of this advisory opinion differ materially from those in Advisory Opinion 2003-23 (WE LEAD), in which the Commission approved a proposal by WE LEAD, a nonconnected political committee, to treat all costs associated with WE LEAD’s solicitation of earmarked contributions from the general public as independent expenditures. Unlike NRA PAC, which is a corporate-sponsored SSF, WE LEAD was a nonconnected committee and therefore did not have a sponsoring organization to control

⁹ The Explanation and Justification for 11 CFR 114.2(f) addresses solicitation, collecting, and forwarding of the earmarked funds as part of a single activity by the SSF.

¹⁰ As a multicandidate political committee, NRA PAC is subject to a contribution limit of \$5,000 per candidate, per election. Thus, its expenses for soliciting and transmitting contributions to candidates must be aggregated with any other contributions it provides to each candidate, and the aggregate total must not exceed the \$5,000 limit per candidate, per election. *See* 2 U.S.C. 441a(a)(1)(C); 11 CFR 110.2(b).

1 and subsidize its operations. Thus, WE LEAD, like any other nonconnected committee,
2 was entirely dependent upon public solicitations to fund its operations and was not
3 subject to 11 CFR 114.2(f).

4 Although NRA PAC must treat its costs to solicit and transmit earmarked
5 contributions as contributions from NRA PAC to the designated candidates, NRA PAC
6 would not need to treat the value of the earmarked funds as contributions by NRA PAC
7 to the designated candidate, unless NRA PAC exercises direction or control over a
8 contributor's choice of the recipient of an earmarked contribution. *See* 11 CFR 110.6(d).

9 Although NRA PAC will, through its public solicitations, solicit contributions
10 earmarked for specific candidates, NRA PAC's proposal to collect and forward
11 earmarked contributions only for its preferred candidates would not, by itself, place NRA
12 PAC in a position to exercise "direction or control" over an individual's choice about
13 whether to make a contribution to a specific candidate, particularly where the solicitation
14 is to the general public. *See* Advisory Opinion 1980-46 (National Conservative Political
15 Action Committee) (a mailing containing a "clear suggestion that the individual receiving
16 the communication make a contribution to a specific candidate through [the PAC] as an
17 intermediary" did not constitute direction or control by the PAC because "the individual
18 contributor, not [the PAC,] makes the choice whether to make a contribution to the
19 specified candidate."); *cf.* Advisory Opinion 1986-04 (Armstrong World Industries)
20 (corporation was able to exercise direction or control over choice of earmarked
21 contribution when corporate president's office, and public relations and public affairs
22 offices, conducted solicitation of corporate executives).

1 NRA PAC plans to collect and forward contributions that have been earmarked
2 for NRA PAC's preferred candidates. Any contribution that NRA PAC receives that has
3 not been earmarked by the contributor for one of these candidates will be returned to that
4 contributor. Accordingly, once NRA PAC receives an earmarked contribution, NRA
5 PAC will not exercise any discretion in determining the recipient of the funds. The
6 contribution will either be forwarded to the designated candidate or it will be returned to
7 the contributor. *See* Advisory Opinion 2003-23 (WE LEAD) (PAC found not to exercise
8 direction or control because it lacked discretion in determining the recipient of earmarked
9 funds).

10 Therefore, in light of the solicitation process you propose and the fact that NRA
11 PAC will not have any discretion over the recipient of the earmarked funds it collects and
12 forwards, NRA PAC will not exercise direction or control over the choice of the recipient
13 candidate under 11 CFR 110.6(d). Thus, although NRA PAC must treat its costs of
14 soliciting, collecting and transmitting earmarked contributions as contributions by NRA
15 PAC to the relevant candidates, because NRA PAC will not exercise direction or control
16 over the contributor's choice of candidate, NRA PAC is not required to treat the
17 earmarked contributions that it forwards to candidates as contributions from NRA PAC.

18 *3. May NRA PAC continue to make independent expenditures with respect to a*
19 *candidate after it (a) obtains any e-mail or street address from the candidate's*
20 *authorized committee for purposes of transmitting earmarked contributions and/or (b)*
21 *sends the candidate's authorized committee technical information about the decryption*
22 *process necessary for future earmarked contributions?*

1 Yes. As discussed in the answer to Question 1, the Commission concludes that
2 none of the proposed public solicitations would be a “coordinated communication”
3 because they would each fail to meet any of the conduct standards contained in the third
4 prong of the “coordinated communication” test at 11 CFR 109.21. The limited candidate
5 contacts you propose would not, by themselves, alter the independence of future
6 activities.

7 This response constitutes an advisory opinion concerning the application of the
8 Act and Commission regulations to the specific transaction or activity set forth in your
9 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
10 of the facts or assumptions presented, and such facts or assumptions are material to a
11 conclusion presented in this advisory opinion, then the requestor may not rely on that
12 conclusion as support for its proposed activity.

13
14 Sincerely,
15
16
17

18 Michael E. Toner
19 Chairman
20

21 Enclosures (Advisory Opinions 2003-23, 1997-16, 1988-38, 1986-04 and 1980-46)

1 ADVISORY OPINION 2006-14

2
3 Carol A. Laham, Esquire
4 D. Mark Renaud, Esquire
5 Wiley Rein & Fielding, LLP
6 1776 K Street, NW
7 Washington, DC 20006

DRAFT C

8
9 Dear Ms. Laham and Mr. Renaud:

10 We are responding to your advisory opinion request on behalf of the National
11 Restaurant Association's political action committee ("NRA PAC"), regarding the
12 application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and
13 Commission regulations to a proposal by NRA PAC to communicate with the general
14 public to expressly advocate the election or defeat of, and solicit contributions to, certain
15 clearly identified candidates for Federal office. NRA PAC also proposes to solicit
16 contributions from the general public earmarked for Federal candidates, which NRA PAC
17 would then collect and forward to the designated candidates.

18 The Commission concludes that NRA PAC may expressly advocate and solicit
19 contributions to be sent directly to clearly identified candidates for Federal office in
20 communications with the general public. In addition, NRA PAC may solicit the general
21 public to send contributions earmarked for candidates to NRA PAC and may treat the
22 cost of soliciting, collecting and transmitting those earmarked funds as independent
23 expenditures.

24 ***Background***

25 The facts presented in this advisory opinion are based on your letters received on
26 March 24 and April 6, 2006.

1 NRA PAC is the separate segregated fund (“SSF”) of the National Restaurant
2 Association (“NRA”), an incorporated nonprofit trade association exempt from taxation
3 under Section 501(c)(6) of the Internal Revenue Code. NRA PAC proposes to fund
4 communications to the general public that expressly advocate the election or defeat of
5 certain clearly identified candidates for Federal office. In the same or separate
6 communications, NRA PAC also proposes to solicit contributions to certain clearly
7 identified candidates for Federal office. NRA PAC intends to distribute these
8 communications via e-mail and direct mail, on NRA’s publicly available website, and in
9 paid advertisements on other publicly available websites.

10 NRA PAC also proposes to serve as a conduit or intermediary for the candidate
11 contributions that it solicits through the communications described above. Accordingly,
12 in its public solicitations, NRA PAC will ask contributors to send personal checks
13 payable to a designated candidate’s authorized committee to NRA PAC for delivery by
14 NRA PAC to the candidate’s authorized committee, or to provide credit card information
15 to NRA PAC, which NRA PAC would then transmit by secure means to the candidate
16 designated by the contributor.¹ NRA PAC plans to forward all earmarked contributions
17 to the selected candidate’s authorized committee, along with contributor identification
18 and any necessary electronic information that the committee would need to process the
19 contribution, within ten days of receipt.

20 NRA PAC does not propose to solicit any contributions for itself in these
21 communications, nor does NRA PAC propose to deposit any funds that it receives as a
22 result of the communications into its own account or otherwise divert the funds for any

¹ NRA PAC will not itself process any credit card transactions.

1 uses other than those clearly indicated in the contributor's earmarking instructions.

2 Unless a contributor is a member of NRA's solicitable class,² NRA PAC plans to return
3 to the contributor any contribution that has not been earmarked by the contributor for a
4 particular candidate. With respect to contributions made by credit card via the Internet,
5 NRA PAC plans to use a website program that will permit only contributions that have
6 been earmarked to a selected candidate.

7 In its public solicitations, NRA PAC plans to inform prospective contributors that
8 contributions are limited to \$2,100 per election, that each contribution will be aggregated
9 for purposes of the \$2,100 per election contribution limit with any previous contribution
10 made by the contributor to the selected candidate, that contributions will be earmarked
11 pursuant to 2 U.S.C. 441a(a)(8) and 11 CFR 110.6, and that contributions by foreign
12 nationals are prohibited. In addition, each public solicitation will include a "best efforts"
13 statement pursuant to 11 CFR 104.7, and will request "all required information as
14 discussed in previous Commission opinions."

15 NRA PAC plans to make the proposed public solicitations without first
16 communicating with any candidate, authorized committee, or political party committee,
17 or an agent of any of the foregoing, other than to verify the addresses to which NRA PAC
18 should send earmarked contributions and to provide technical information to enable the
19 committee to decrypt contributors' encrypted credit card information. NRA PAC plans
20 to include in each public solicitation a disclaimer stating that the communication was

² NRA's "solicitable class" includes its own restricted class (*i.e.*, NRA's members and executive and administrative personnel, and their families), and NRA's other employees, who may be solicited up to two times each year. *See* 2 U.S.C. 441b(b)(4)(A)-(C); 11 CFR 114.5(g), 11 CFR 114.6, and 11 CFR 114.7. In addition, as the SSF of a trade association, NRA PAC may also solicit the stockholders and executive and administrative personnel of NRA's member corporations and their families, if certain conditions are met. *See* 2 U.S.C. 441b(b)(4)(D); 11 CFR 114.1(j), 11 CFR 114.4, and 11 CFR 114.8.

1 paid for by NRA PAC and was not authorized by any candidate or candidate's
2 committee, and to provide NRA PAC's Web address, phone number, or street address.

3 NRA PAC plans to report as independent expenditures the costs directly
4 connected to its proposed communications. NRA PAC plans to treat as operating
5 expenses the costs of processing and transmitting the earmarked contributions and
6 contributor information.

7 ***Questions Presented***

8 *1. May NRA PAC pay for, and treat as independent expenditures,*
9 *communications to the general public that expressly advocate the election or defeat of a*
10 *clearly identified Federal candidate and/or solicit contributions for a clearly identified*
11 *Federal candidate?*

12 *2. May NRA PAC pay, and treat as operating expenses, the cost of transmitting to*
13 *the designated recipient candidate any contributions raised through NRA PAC's*
14 *solicitation communications to the general public (including the cost of transmitting*
15 *required contributor information)?*

16 *3. May NRA PAC continue to make independent expenditures with respect to a*
17 *candidate after it (a) obtains any e-mail or street address from the candidate's*
18 *authorized committee for purposes of transmitting earmarked contributions and/or (b)*
19 *sends the candidate's authorized committee technical information about the decryption*
20 *process necessary for future earmarked contributions?*

21 ***Legal Analysis and Conclusions***

22 *1. May NRA PAC pay for, and treat as independent expenditures,*
23 *communications to the general public that expressly advocate the election or defeat of a*

1 *clearly identified Federal candidate and/or solicit contributions for a clearly identified*
2 *Federal candidate?*

3 Yes, NRA PAC may pay for communications to the general public that expressly
4 advocate the election or defeat of clearly identified Federal candidates and/or solicit
5 contributions to Federal candidates, so long as NRA PAC pays for the communications
6 with voluntary contributions that it has received pursuant to the Act and Commission
7 regulations and does not solicit contributions to any SSF, including itself. NRA PAC
8 may treat the costs of its express advocacy and solicitation communications to the general
9 public as independent expenditures, so long as the communications are not coordinated
10 with any candidates, their authorized committees or agents.

11 The Act prohibits corporations, including incorporated trade associations such as
12 NRA, from making any contributions or expenditures in connection with a Federal
13 election.³ See 2 U.S.C. 441b. With some exceptions, this prohibition extends to
14 communications that expressly advocate the election or defeat of a clearly identified
15 Federal candidate made by a corporation to anyone outside of the corporation's
16 solicitable class.

17 The Act does not, however, impose the same restrictions on communications
18 made by a corporation's SSF, such as NRA PAC. Instead, the Act allows an SSF to use
19 voluntary contributions that have been properly made to the SSF to fund communications
20 with the general public on any subject, including communications that expressly advocate
21 the election or defeat of clearly identified Federal candidates, so long as the
22 communications do not solicit contributions to any SSF, including itself. See 2 U.S.C.

³ Contributions include direct or indirect payments or gifts of money or any services, or anything of value, to any candidate for Federal office. See 2 U.S.C. 441b(b)(2); 11 CFR 114.1(a)(1).

1 441b(b)(4)(A)(i); 11 CFR 114.5(i); *see also* Advisory Opinions 1997-16 (ONRC Action)
2 and 1988-38, n.3 (Chicago Bd. Of Trade).

3 In Advisory Opinion 1997-16, the Commission advised Oregon Natural
4 Resources Council Action (“ONRC Action”), an incorporated membership organization,
5 that ONRC Action could not use its funds, facilities and personnel to communicate its
6 endorsements of Federal candidates on ONRC Action’s website, without any limitation
7 on access by the general public. The Commission noted, however, that “the [SSF] of
8 ONRC Action[] can make contributions and expenditures with regard to Federal
9 elections, subject to the Act’s limits and disclosure requirements. The cost of making
10 public the [corporation’s] candidate endorsements, if paid for by the [SSF], and
11 depending on whether the distribution activity was coordinated with the various
12 candidates endorsed, would be considered either an independent expenditure on behalf of
13 the candidates endorsed or an in-kind contribution to them.”⁴

14 Commission regulations do not distinguish between communications by an SSF
15 that expressly advocate the election or defeat of a clearly identified Federal candidate, on
16 the one hand, and communications that solicit contributions to a clearly identified Federal
17 candidate, on the other hand, so long as the SSF pays for the communications with
18 voluntary contributions and does not solicit contributions to any SSF in the
19 communications. *See* 11 CFR 114.5(i).

20 Accordingly, NRA PAC may expressly advocate the election or defeat of, and
21 solicit contributions for, clearly identified candidates via e-mail and direct mail, on

⁴ The Commission also indicated that ONRC Action’s SSF could use ONRC Action’s voice mail system to inform members of the general public who telephoned ONRC Action about the corporation’s candidate endorsements, so long as the SSF assumed all costs associated with its use of the voice mail system.

1 NRA's publicly available website, and in advertisements on other publicly available
2 websites, provided that NRA PAC pays for the communications with voluntary
3 contributions and does not solicit contributions to any SSF, including itself.

4 The costs NRA PAC incurs in making communications to the general public that
5 expressly advocate the election or defeat of clearly identified Federal candidates and/or
6 solicit contributions to Federal candidates must be treated as either independent
7 expenditures on behalf of the candidates for whom NRA PAC expressly advocates or
8 solicits, or as in-kind contributions to the candidates, depending on whether the
9 communications are "coordinated communications" under 11 CFR 109.21.

10 To be a "coordinated communication" under 11 CFR 109.21, a communication
11 must satisfy each prong of a three-pronged test.⁵ First, the communications must meet
12 the "payment prong," in that someone other than a candidate, an authorized committee, a
13 political party committee, or an agent of any of the foregoing must pay for the
14 communication. *See* 11 CFR 109.21(a)(1). Second, the subject matter of the
15 communication must meet a "content standard." *See* 11 CFR 109.21(a)(2); 11 CFR
16 109.21(c). Third, the interaction between the person paying for the communication and
17 the candidate, the candidate's committee, a political party committee, or their agents must
18 meet a "conduct standard." *See* 11 CFR 109.21(a)(3); 11 CFR 109.21(d).

19 NRA PAC's communications with the general public would meet the payment
20 prong of the coordinated communication test because they would be paid by NRA PAC
21 and not by a candidate, an authorized committee, a political party committee, or their

⁵ The Commission recently made certain revisions to 11 CFR 109.21, effective July 10, 2006. *See* Coordinated Communications Final Rules, 71 *Fed. Reg.* 33190 (June 8, 2006). However, none of the changes in the revised rules affects the advice provided in this advisory opinion.

1 agents. 11 CFR 109.21(a)(1). All of NRA PAC's proposed communications, with the
2 exception of those sent through e-mail, would also meet the content standard because
3 they would contain express advocacy.⁶ 11 CFR 109.21(c)(3). Nonetheless, the
4 Commission concludes that none of the communications would be a "coordinated
5 communication," because they would each fail to meet any of the conduct standards
6 contained in the third prong of the test.⁷

7 The only proposed interactions between NRA PAC and a candidate or a
8 candidate's authorized committee involve NRA PAC contacting the intended recipient-
9 candidate to verify the addresses to which earmarked contributions should be sent and to
10 provide certain technical information necessary for decryption of protected credit card
11 information. The limited interactions between NRA PAC and a candidate or a
12 candidate's authorized committee necessary to verify addresses and to provide technical
13 information, without more, would not alone satisfy any of the conduct standards
14 contained in the coordinated communication rule. 11 CFR 109.21(d) and note 7, above.
15 Thus, should NRA PAC wish to solicit the general public to send contributions directly to
16 a Federal candidate, any communications between it and the candidate's authorized
17 committee that are limited to verifying the addresses to which contributions should be
18 sent would not be "coordinated communications" and any costs associated with this
19 activity can be treated as independent expenditures.

⁶ E-mail communications cannot be coordinated communications under 11 CFR 109.21(c)(3) because they do not qualify as "public communications." *See* 11 CFR 100.26 (2006).

⁷ These conduct standards include, in relevant part: (1) "requests or suggestions" for communications by candidates; (2) "material involvement" in the making of communications; (3) "substantial discussions" regarding candidate plans, projects, activities, or needs; (4) involvement of "common vendors;" and (5) involvement of individuals who were formerly employees or independent contractors of a candidate. 11 CFR 109.21(d)(1)-(5). The Commission has focused on the first three conduct standards because you stated in your request for an advisory opinion that NRA PAC does not propose to use any common vendors, former employees or independent contractors in its proposed activities.

1 2. *May NRA PAC pay, and treat as operating expenses, the cost of transmitting to*
2 *the designated recipient candidate any contributions raised through NRA PAC's*
3 *solicitation communications to the general public (including the cost of transmitting*
4 *required contributor information)?*

5 NRA PAC may pay to solicit the general public to send earmarked contributions
6 to NRA PAC, and may pay the costs of collecting and forwarding those earmarked
7 contributions to the designated candidates. Additionally, NRA PAC may treat the costs
8 of soliciting, collecting and transmitting the earmarked funds as independent
9 expenditures by NRA PAC on behalf of the designated candidates.

10 Although a corporation and its SSF are expressly prohibited from soliciting
11 contributions *to any SSF* from persons outside of the corporation's solicitable class, *see* 2
12 U.S.C. 441b(b)(4)(A)(i), neither the Act nor Commission regulations prohibit an SSF
13 from soliciting contributions *to a Federal candidate* from persons beyond its solicitable
14 class. As discussed in the answer to your first question, an SSF may solicit the general
15 public to send contributions directly to candidates. The Commission's regulations also
16 specifically contemplate an SSF "[s]oliciting contributions to a candidate" and
17 "collecting and forwarding contributions earmarked to a candidate." *See* 11 CFR
18 114.2(f)(3); *see also* Explanation and Justification for 11 CFR 114.2(f)(3), Final Rule and
19 Transmittal of Regulations to Congress, Corporate and Labor Organization Activity;
20 Express Advocacy and Coordination with Candidates, 60 FR 64260, 64265 (Dec. 14,
21 1995) (SSFs "may continue to solicit, collect and forward earmarked contributions to
22 candidates . . .").

1 Because an SSF may solicit, collect, and forward earmarked contributions, and
2 because nothing in 11 CFR 114.2(f) specifically limits an SSF to conducting these
3 activities only with respect to its solicitable class, the Commission concludes that an SSF
4 may solicit the general public for earmarked contributions and also may then collect and
5 forward the earmarked contributions to the designated candidates.⁸ Thus, based on the
6 facts you present in your request, NRA PAC may solicit contributions to Federal
7 candidates from persons beyond its solicitable class, to be collected and forwarded by
8 NRA PAC, and NRA PAC may pay the costs of collecting and forwarding those
9 earmarked contributions. Although NRA PAC may pay the costs of the proposed public
10 solicitations, as well as the costs associated with collecting and forwarding earmarked
11 contributions that result from the solicitations, these costs must be paid from voluntary
12 contributions to NRA PAC (*i.e.*, not from corporate treasury funds).

13 In Advisory Opinion 2003-23 (WE LEAD), the Commission approved a similar
14 proposal by WE LEAD, a nonconnected political committee, to treat all costs associated
15 with WE LEAD's solicitation of earmarked contributions from the general public as
16 independent expenditures so long as the solicitations were not coordinated with any
17 Federal candidate, authorized committee of a candidate, or agent of either. *See* 11 CFR
18 109.20 and 109.21.⁹ If the solicitation or collection and forwarding is coordinated with a
19 Federal candidate, an authorized committee of a candidate, a political party committee, or

⁸ The regulations at 11 CFR 114.5(i) permit SSF communications to the general public with one narrow exception (*i.e.*, soliciting contributions to an SSF). 11 CFR 114.5(i) (SSFs "may, using voluntary contributions, communicate with the general public, except that such communications may not solicit contributions to a separate segregated fund . . .").

⁹ There was no indication of any potential coordination of the solicitation with a political party committee, and thus the Commission did not address any potential contribution resulting from coordination with a political party committee under 11 CFR 109.20 or 109.21.

1 an agent of any of the foregoing, the direct costs of solicitations would constitute an in-
2 kind contribution. *See id.* Although NRA PAC is a corporate-sponsored SSF, the
3 analysis in Advisory Opinion 2003-23 was not limited to nonconnected committees and
4 the Commission concludes that it is equally applicable to an NRA PAC's activities as an
5 SSF.¹⁰

6 As discussed in the answer to Question 1, the Commission concludes that the
7 costs incurred by NRA PAC related to its proposed activity would be independent
8 expenditures on behalf of the designated candidates, rather than in-kind contributions,
9 because the activity would fail to meet any of the conduct standards contained in the third
10 prong of the "coordinated communications" test in 11 CFR 109.21. Therefore, NRA
11 PAC may treat the costs of soliciting, collecting and transmitting the earmarked
12 contributions as independent expenditures on behalf of the designated candidates, rather
13 than contributions to those candidates.¹¹

14 In addition, NRA PAC would not need to treat the value of the earmarked funds
15 as contributions by NRA PAC to the designated candidate, unless NRA PAC exercises
16 direction or control over a contributor's choice of the recipient of an earmarked
17 contribution. *See* 11 CFR 110.6(d). Although NRA PAC will, through its public
18 solicitations, solicit contributions earmarked for specific candidates, NRA PAC's

¹⁰ When the Commission promulgated 11 CFR 114.2(f)(2) and (3), the Commission noted that while an SSF "may continue to solicit, collect and forward earmarked contributions . . .," the money expended by the SSF on these activities "will count against the [SSF's] contribution limit for the candidate(s) involved." *See* Explanation and Justification for 114.2(f), 60 *Fed. Reg.* 64260, 64265. That language is not reflected in the regulations themselves and appears to merely follow the conclusion of Advisory Opinion 1980-46 (National Conservative Political Action Committee), which the Commission subsequently superseded on this specific point in Advisory Opinion 2003-23.

¹¹ The costs of transmitting earmarked contributions are not appropriately treated as "operating expenses" because the costs are not directly related to the day-to-day administration or operation of the PAC but are, instead, incurred solely for the purpose of directing contributions to clearly identified candidates.

1 proposal to collect and forward earmarked contributions only for its preferred candidates
2 would not, by itself, place NRA PAC in a position to exercise “direction or control” over
3 an individual’s choice about whether to make a contribution to a specific candidate,
4 particularly where the solicitation is to the general public. *See* Advisory Opinion 1980-
5 46 (National Conservative Political Action Committee) (a mailing containing a “clear
6 suggestion that the individual receiving the communication make a contribution to a
7 specific candidate through [the PAC] as an intermediary” did not constitute direction or
8 control by the PAC because “the individual contributor, not [the PAC,] makes the choice
9 whether to make a contribution to the specified candidate.”); *cf.* Advisory Opinion 1986-
10 04 (Armstrong World Industries) (corporation was able to exercise direction or control
11 over choice of earmarked contribution when corporate president’s office, and public
12 relations and public affairs offices, conducted solicitation of corporate executives).

13 NRA PAC plans to collect and forward contributions that have been earmarked
14 for NRA PAC’s preferred candidates. Any contribution that NRA PAC receives that has
15 not been earmarked by the contributor for one of these candidates will be returned to that
16 contributor. Accordingly, once NRA PAC receives an earmarked contribution, NRA
17 PAC will not exercise any discretion in determining the recipient of the funds. The
18 contribution will either be forwarded to the designated candidate or it will be returned to
19 the contributor. *See* Advisory Opinion 2003-23 (WE LEAD) (PAC found not to exercise
20 direction or control because it lacked discretion in determining the recipient of earmarked
21 funds).

22 Therefore, in light of the solicitation process you propose and the fact that NRA
23 PAC will not have any discretion over the recipient of the earmarked funds it collects and

1 forwards, NRA PAC will not exercise direction or control over the choice of the recipient
2 candidate under 11 CFR 110.6(d). Thus, NRA PAC is not required to treat the earmarked
3 contributions that it forwards to candidates as contributions from NRA PAC.

4 *3. May NRA PAC continue to make independent expenditures with respect to a*
5 *candidate after it (a) obtains any e-mail or street address from the candidate's*
6 *authorized committee for purposes of transmitting earmarked contributions and/or (b)*
7 *sends the candidate's authorized committee technical information about the decryption*
8 *process necessary for future earmarked contributions?*

9 Yes. As discussed in the answer to Question 1, the Commission concludes that
10 none of the proposed public solicitations would be a “coordinated communication”
11 because they would each fail to meet any of the conduct standards contained in the third
12 prong of the “coordinated communication” test at 11 CFR 109.21. The limited candidate
13 contacts you propose would not, by themselves, alter the independence of future
14 activities.

15 This response constitutes an advisory opinion concerning the application of the
16 Act and Commission regulations to the specific transaction or activity set forth in your
17 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
18 of the facts or assumptions presented, and such facts or assumptions are material to a

1 conclusion presented in this advisory opinion, then the requestor may not rely on that
2 conclusion as support for its proposed activity.

3

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Sincerely,

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Michael E. Toner

9

Chairman

10

11 Enclosures (Advisory Opinions 2003-23, 1997-16, 1988-38, 1986-04 and 1980-46)